Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

DONALD McDONALD,

Petitioner,

vs.

KING COUNTY,

Respondent.

Petition For Writ Of Certiorari
To The Washington Court Of Appeals, Div. I

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether a local government may deny a property owner an otherwise valid use of his property by way of an irrebuttable presumption that the property is "simply too steep," without affording the property owner an opportunity to demonstrate in a fair and impartial hearing that approval of the proposed use can be done in a safe and environmentally responsible manner. This issue is especially compelling because of the undisputed fact that King County allows building permits, residential and commercial, on such steep slopes where lots have already been created and allows roads to be cut onto such steep slopes in long subdivisions. It is even more compelling because the county's purported reasons for the regulation, landslide, seismic, and erosion hazards, are provided for in other sensitive areas regulations to which the property is subject.

From a broader perspective, this case presents the potential for precedential analysis regarding the distinction between lot creation and building regulation. This case presents the issue of whether a platting application can be denied because of possible future concerns about density of development on those lots. Because platting neither alters the physical aspects of the property nor vests any right to construct improvements, the issue is presented as to whether there is a rational connection between the per se rule and any valid governmental action.

QUESTIONS PRESENTED FOR REVIEW – Continued

The case also presents a clear demonstration of an administrative denial of the constitutional right to procedural due process. Although the County acknowledged that it would deny the application with or without special studies, it has so far successfully maintained that McDonald's application should be denied for failure to provide those studies or to appeal in a separate hearing the request for those studies that would be ignored. The questions presented for review are therefore as follows:

1. Whether the irrebuttable presumption created by administrative guidelines purporting to prohibit short plats on slopes exceeding 40 percent without consideration on a case by case basis violates substantive due process when the County permits residential and commercial building as well as road cutting on long subdivisions on such slopes and where overlapping regulation exists to address the county's rationale for the per se rule.

2. Whether a rational relationship exists between the 40 percent rule and the possibility of future development on the proposed lots under the reasonable use exception where platting does not vest any right to construct improvements.

3. Whether the County's requirement that McDonald submit expensive technical studies that would not be considered violates procedural due process and arbitrarily limits McDonald's right to judicial redress of a constitutional wrong.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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The Order of the Supreme Court of Washington denying discretionary review and terminating review dated February 14, 1996 is reproduced as Appendix A. The decision of the Washington Court of Appeals, Div. I, filed May 30, 1995 is reproduced as Appendix B. The Order Denying Motion for Reconsideration by the Washington Court of Appeals, Div. I, is reproduced as Appendix C. The Decision of the Zoning and Subdivision Hearing Examiner for King County dated December 18, 1991 is reproduced as Appendix D.

JURISDICTION

The Order of the Supreme Court of Washington denying discretionary review was entered on February 14, 1996. The decision of the Washington Court of Appeals, Div. I, review of which is sought in this petition, was filed on May 30, 1995 and a motion for reconsideration was denied on August 30, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a). Pursuant to Supreme Court Rule 13.1., this petition is timely filed if filed on or before May 14, 1996 because it seeks review of an appellate decision that was subject to review by the state court of last resort, which review was denied on February 14, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provision at issue in this matter is the Fourteenth Amendment to the United States Constitution which provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The administrative rules at issue are the Administrative Guidelines for Building Setbacks from Hazardous Slopes on Plats and Short Plats and the Slope Density Guidelines. The relevant portions of these guidelines are set out in Appendix E. The Ordinances at issue are the King County Comprehensive Plan, 1985, Policies E-103, E-304 - 307, set out at Appendix F; KCC 21.54.250 (1990), relevant portions of which are set out at Appendix G; KCC 21.54.060 (1990), relevant portions of which are set out at Appendix H; and KCC 21.54.150, 160, 170 (1979), set out at Appendix I.

STATEMENT OF CASE

A. Procedural History

This lawsuit was originally filed in the King County Superior Court for the State of Washington, and appealed the decision of the King County zoning and subdivision hearing examiner affirming the denial of petitioner's short plat application. At the administrative hearing, the petitioner Donald McDonald ("McDonald") contended, *inter alia*, that the administrative rules relied upon by the County in denying the application violated his right to

due process under the Fourteenth Amendment to the Constitution of the United States. The administrative rules (hereinafter referred to collectively as the "40% rule") purport to deny, without opportunity for hearing on the merits of the application, any short plat application on property exceeding 40% in slope.

The hearing examiner issued his findings, conclusions and decision denying petitioner's appeal on December 18, 1991, concluding that (1) the application was precluded by the administrative guidelines, and (2) McDonald had failed to exhaust an administrative remedy when he failed to separately appeal the County's demand for additional technical studies that, by County admission, would not have been considered.

Petitioner appealed to the Superior Court of King County, which after trial on the record, denied petitioner's appeal. Appeal was subsequently taken to the Washington Court of Appeals, Div. I, which affirmed. The Hon. Susan Agid filed a separate opinion, dissenting in part on the ground that the administrative guidelines violated McDonald's right to due process under the Fourteenth Amendment by arbitrarily denying him a hearing on the merits of his proposal. A Motion for reconsideration was filed by McDonald and an Answer to the Motion was requested by the Court. On August 30, 1995, the Motion for Reconsideration was denied. Subsequently, McDonald filed a petition for discretionary review with the Supreme Court of Washington, which was denied.

B. The Case

This action challenges the constitutionality of regulations which purport to preclude the proposed short plat without opportunity for a review on the merits of the application simply because the property exceeds 40% in slope in its entirety, a fact which is not in dispute.

At the administrative hearing, the County several times admitted that it had approved and does approve building permits, though not short plats, on property with slopes exceeding 40 percent. For example, Lydia Reynolds, a senior engineer with the County, stated that "we are not creating plats or short plats on the lots that are that steep." County Engineer Howard Haemmerle admitted to this same proposition. Ms. Reynolds also admitted that houses can be safely built on 40% slopes. After reviewing County documents, Mr. McDonald found and submitted evidence that the County has allowed residential and commercial building on slopes exceeding 40 percent.

Upon questioning by the Examiner, Ms. Reynolds also acknowledged that the permit would have been denied on the basis of the 40% rule whether or not Mr. McDonald submitted the requested studies. The following dialogue is instructive:

Examiner: So the answer to the question raised earlier is that you would not approve a short plat on this property?

Ms. Reynolds: That is true.

Examiner: With or without the study?

Ms. Reynolds: That is true.

This position was reiterated by Mr. Haemmerle who stated that the County's position that the short plat was denied "based on the understanding fr[illegible]n the appellant that he does not meet the criteria for steep slopes."

At the hearing, McDonald discovered that the County also sought to deny his application on the grounds that had failed to submit special (technical) studies pursuant to the Sensitive Areas Ordinance, Title 21, King County Code, Ordinance 4365. Those requests were made even though the County denied the application on the basis of the 40% rule. The County contends that even though it would not consider the special studies, McDonald was required to submit them before challenging the validity of an administrative rule, and that having failed to do so he has failed to exhaust an administrative remedy.

The relevant portions of the administrative guidelines in question have subsequently been adopted as part of the Sensitive Areas Ordinance, KCC 21.54.250. (Appendix G). Although McDonald's application was vested in the prior code, the new code continues to preclude development on slopes exceeding 40 percent through the requirement of development buffers from such slopes. Whether as a result of the 40 percent rule or the steep slopes ordinance, the effect is the same: a complete prohibition against development on steep slopes.

Ostensibly, these buffers, and steep slope regulation in general, are intended to mitigate and protect against landslide and seismic hazards. However, the county's

Sensitive Areas Ordinance already defines and provides for protection against such hazards. The County has maintained throughout this lawsuit that the absolute prohibition against development on steep slopes is mitigated by the so-called reasonable use exception, which has been codified at KCC 21.54.060, (Appendix H), which is, in essence, a variance proceeding. Under the reasonable use exception, a hearing examiner may, but is not required to, approve a non-conforming use where the sensitive areas ordinance would deny all reasonable use of the property, there is no other reasonable use with less impact on the sensitive area, and the development does not pose an unreasonable threat to the public health, safety, or welfare on or off the development site.

According to the County, McDonald may be able to obtain a reasonable use exception for a single family residence on the proposed site. The County will not allow a short plat, however, because once lots are drawn, a reasonable use exception application could be submitted for a residence on each lot. If one assumes that each such application is approved, an assumption that is far from obvious, four single family homes could eventually be built upon the proposed short plat site. The County has maintained, without any evidence to support the claim, that it is permitted to preclude a short plat on steep slopes to prevent an alleged increased risk of erosion, landslide, and drainage problems allegedly associated with increased density of development on steep hillsides. The county's postition is supported not by fact, but rather by "findings" codified in the Comprehensive Plan policies. (Appendix F). The Court of Appeals, Div. I accepted

the county's claims at face value under deferential review. (Appendix B).

McDonald has consistently maintained that density is a zoning issue not related to sensitive areas regulation. He has further maintained that a proposal to simply create lots cannot be denied without a reasonable opportunity for a hearing on the merits simply because it is possible, though not probable, that improvements may be allowed on those lots, which improvements are assumed by their density to create increased risks to the public health, safety, and welfare.

The application seeks to create four lots out of a 1.22 acre parcel, the resulting size of each lot to exceed the minimum zoning requirements, all within and surrounded by residential development created many years before. McDonald contends that if density is an issue for consideration in this application, that issue pertains to the McDonald property in no greater measure than it does to the public at large.

REASONS FOR GRANTING REVIEW

Under Supreme Court Rule 10.1(c), the Court may accept review when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court. Both of these reasons are present in this case.

I.

THE WASHINGTON COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT.

Conclusive presumptions are and long have been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United State Constitution. *Vandis v. Kline*, 412 U.S. 441, 446, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1973). This is because irrefutable presumptions operate to prohibit those burdened by them from having a fair opportunity to rebut the fact or facts presumed by the legislative body. *Heiner v. Donnan*, 285 U.S. 312, 329, 76 L.Ed.2d 772, 52 S.Ct. 358 (1932). Where a conclusive presumption also operates to deprive one of a federal constitutional right without a hearing, it violates substantive due process, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974), the Equal Protection Clause, *Stanley v. Illinois*, 405 U.S. 645, 649, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), and procedural due process, *Bell v. Burson*, 402 U.S. 535, 539, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971).

Conclusive presumptions are inherently arbitrary because they are not the least restrictive alternative means to achieve a legitimate state interest, *Dunn v. Blumstein*, 405 U.S. 330, 353, 21 L.Ed.2d 274, 92 S.Ct. 995 (1972), or because they sacrifice constitutional rights to administrative convenience, *Stanley*, 405 U.S. at 658.

The guaranty of the due process clause demands that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the objective sought to be attained.

Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 85, ___ S.Ct. ___, ___ L.Ed.2d ___ (1980). The constitutional right to own and use one's property is no poor relation to any right secured by the First Amendment. *Dolan v. Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2309, 129 L.Ed. 2d 304 (1994).

McDonald's application was summarily rejected because an administrative rule makes an irrebuttable presumption that short subdivisions will be denied, without further inquiry, where the slope of the property exceeds 40%. This case presents the Court with an opportunity to define the limits of a local government's ability to prohibit a property owner from otherwise authorized platting by application of building development rules without affording him a reasonable opportunity to offer evidence that his property is capable of safe development.

The county has, without citing any evidence, justified this rule as being necessary to prevent presumed risks of landslide, erosion, and drainage, as well as from seismic activity which is alleged to increase with increased density in development. Under deferential review, the Court of Appeals, Div. I, accepted that logic at face value.

The Court ignored the fact that existing regulation, adopted by ordinance, already serves to protect against these risks. The Sensitive Areas Ordinance, Title 21 of the King County Code (KCC) creates and protects several sensitive areas, including Seismic, Class III Landslide, and Erosion. (Appendix I).

Even where such sensitive areas are present, however, these regulations do not create irrebuttable presumptions against development, but rather provide for

case by case consideration of technical studies that allow an applicant to demonstrate the safety of a proposed development. For example, KCC 21.54.160 (Class III Landslide Areas) allows the County to approve, or approve with conditions, a development in this sensitive area upon review of soils technical studies including mitigating measures and construction techniques.

Thus, a proposed development containing a sensitive area as defined by ordinance may nonetheless be approved after consideration of engineering and construction techniques and data. Yet a proposed development containing a steep slope, as defined by administrative rule, will be summarily denied without regard to special studies, mitigating measures, or engineering techniques.

If the 40% rule is indeed intended to protect against presumed landslide, seismic and erosion hazards, why does the County refuse to consider an application containing steep slopes while regularly approving developments containing actual hazards? No rational justification exists for this distinction.

The County has argued that its limited resources justify a cut-off limit. This so-called "speed limit" argument must fail in this case because administrative convenience cannot justify the sacrifice of constitutional rights. *Stanley,* 405 U.S. at 658. This is especially true here, where the same public purpose is regularly and adequately served by the case by case review required by the SAO.

The 40% rule is also indefensible because it does not apply to all proposed developments containing steep slopes. Those whose plats were approved before BALD

adopted the 40% rule are still permitted to build on steep slopes. The County also approves of commercial development on 40% slopes and allows roads to be cut and filled on 40% slopes within proposed long subdivisions. As noted by Judge Agid in her insightful dissenting opinion, the distinction made by the County is entirely arbitrary and "belies any claim that the rule is actually necessary for any proper police power purpose." (Appendix B).

The County justifies this distinction by arguing that short platting creates additional lots which, allegedly, create more concerns. This post hoc pretextual assertion is contradicted by the facts. First, the Sensitive Areas Ordinance itself makes no procedural or substantive distinction between short plats, building permits, grading permits, conditional use permits, and other developments with respect to regulations that arise when sensitive areas are present. (See KCC 21.54.150, 160, 170, Appendix I). All developments with sensitive areas are subject to case by case review under the legislatively created SAO. Yet when the administratively created steep slope is present, only short plats are denied an examination on the merits.

The density justification makes even less sense where the County allows long subdivision road cutting and commercial development on steep slopes. If the issue is density of development, then surely these other developments create more potential for problems than a proposal to merely create four lots.

In sum, the 40% rule presented here should stand as a perfect example of an unreasonable, arbitrary regulation that bears no real and substantial relation to the objective sought to be attained.

Review by this Court is appropriate not only because this case raises important federal questions. It is a potential bellwether to which the citizens of this country may look when they are told that the government knows best and that the circumstances in their individual cases are not worthy of consideration. It is a case that will stand for the notion that individual rights must not be subservient to administrative convenience or callousness.

II.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – WHEN DOES AN ADMINISTRATIVE REMEDY BECOME SO VAIN, USELESS, AND BURDENSOME THAT IT VIOLATES PROCEDURAL DUE PROCESS.

The Court of Appeals, Div. I, ignored in this case valid case law holding that vain and useless acts will not be required before judicial redress is sought. *See Orion Corp. v. State*, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985), *cert. denied*, 486 U.S. 1022, 100 L.Ed.2d 227, 108 S.Ct. 1996 (1988) (A willingness to consider an application is irrelevant if there is no hope of success if one is submitted.)

Any doctrine which limits access to the courts limiting the scope of issues considered, or otherwise, must be viewed with profound suspicion.

> The risk – great and agonizing danger – in situations of this kind is that the citizen will be caught in the treadmill of an elusive administrative remedy. While he pursues, his constitutional rights are denied and it may take so much time to go through the intricate administrative

> system with all of its hearings and appeals that any relief will come too late and the great occasion, when the right to speak, to worship, or to assemble might have been enjoyed, will be lost.

William O. Douglas, *The Right of the People,* (Greenwood Press, 1958) 65.

It is undisputed that while the County required McDonald to submit further studies, at a potential cost of tens of thousands of dollars, it would not have approved of the application "with or without the studies" because of nonconformance with the 40% rule. The Washington court ignored all notions of due process involved in this case and instead chose to view McDonald's refusal to appeal the request for the special studies that would not be considered as simply an "alternative ground" for denying the short plat application. (Appendix B).

This case is a prime example of the insidious and reprehensible use of the remedies doctrine as a "roadblock" to the challenge of unconstitutional regulations. Local government should not be allowed to enact unconstitutional land use restrictions while simultaneously requiring landowners to submit irrelevant and expensive studies, which will not even be considered, prior to challenging the regulation in court.

Here the applicant is required to "pump oil from a dry hole." *Orion*, 103 Wn.2d at 457, citing *Ogo Assocs. v. Torrance*, 37 Cal. App.3d 330, 834, 112 Cal. Rptr. 761 (1974). First he is advised that a regulation absolutely precludes his application. Then he is told that before he can challenge the constitutional validity of that regulation

he must submit expensive studies, which will not even be considered.

It is the height of absurdity for an applicant to be denied the right to challenge an unconstitutional regulation for which no factual inquiry is required or permitted (other than whether or not the slopes exceed 40%) without first spending thousands of dollars to prepare and submit technical studies that will not be considered.

By accepting review, this Court has an opportunity to provide a great public service. The Court should make it very clear to local governments that they must not create vain and useless roadblocks to constitutional challenges by landowners who have been deprived of lawful uses of their property.

CONCLUSION

For the foregoing reasons, your Petitioner respectfully requests that the Court grant the Petition for Writ of Certiorari.

DATED: May 10, 1996.

Respectfully submitted,

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APPENDIX A

ORDER

THE SUPREME COURT OF WASHINGTON

DONALD McDONALD, Petitioner, v. KING COUNTY; OFFICE OF THE KING COUNTY ZONING AND HEARING EXAMINER; KING COUNTY BUILDING AND LAND DEVELOPEMENT DIVISION, a political subdivision of the State of Washington, Respondents.	NO. 63359-2 ORDER C/A NO. 33547-2-I

All five members of Department I of the Court considered the matters set on its February 13, 1996, Motion Calendar, the files herein and unanimously agreed that the following order be entered. Therefore, Acting Chief Justice Barbara Madsen directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

I CERTIFY THAT THIS ORDER WAS ENTERED BY THE COURT ON THIS 14th DAY OF FEBRUARY, 1996.

RONALD R. CARPENTER,
DEPUTY CLERK

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD McDONALD, Petitioner, v. KING COUNTY; OFFICE OF THE KING COUNTY ZONING AND HEARING EXAMINER; KING COUNTY BUILDING AND LAND DEVELOPEMENT DIVISION, a political subdivision of the State of Washington, Respondents.	NO. 33547-2-I DIVISION ONE

WEBSTER, J. – Donald McDonald appeals a judgment affirming the King County's Zoning and Subdivision Hearing Examiner's denial of his short plat application. He claims the County's requirement for additional geotechnical studies and administrative guidelines prohibiting short plats on slopes exceeding 40 percent were contrary to law, and violated his right to due process.[1]

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[1] The writ originally included claims for damages under 42 U.S.C. 1983. McDonald subsequently filed a separate lawsuit for damages and dismissed the damage claim from this case.

FACTS

McDonald applied for a short plat of a 1.22-acre parcel of property located within a mapped seismic hazard area. The entire site has slopes in excess of 40 percent. The County's Building and Land Development Division (BALD) received a number of letters expressing concern regarding landslide risk, erosion hazards and drainage problems that might result from development of the parcel. A BALD geologist visited the site and concluded that additional information was necessary to address risks associated with development. BALD identified three areas of concern:

> (1) the existence of a mapped sensitive area (seismic hazard) and slopes exceeding 40 % on the site, (2) the possible existence of an unmapped wetland along the southwest property boundary, and (3) concerns regarding the ability of the applicant to provide access that would meet King County Road Standards.

BALD requested McDonald provide technical studies to address these concerns.[2] McDonald asked BALD to make the studies a condition of preliminary plat approval. BALD indicated that it could not grant preliminary approval until it had reviewed and evaluated the

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[2] The studies included: (1) a geotechnical report addressing seismic and landslide hazards; (2) a wetland study to determine the wetland boundary and to determine the impact of the proposed development on the wetland; (3) an engineering assessment of design/construction problems and potential hazards associated with construction of N.E. 201st as a minor access road.

studies. McDonald refused to provide the studies, and BALD then denied the short plat application.

McDonald appealed to the County Hearing Examiner. There was no dispute regarding the existence of steep slopes on the property in excess of 40 percent. The testimony centered around the effects of creating four new home sites on the properties' steep slopes. BALD engineer Howard Haemmerle pointed out that the steep slopes on the property raised serious questions as to whether McDonald would be able to comply with County road standards. Barry Levy, a neighbor, expressed concern that the development of the property would dramatically change conditions on that slope. The Hearing Examiner denied the appeal based on (1) McDonald's failure to provide the technical studies necessary to evaluate the serious public health and safety issues, and (2) because the slope of the entire parcel exceeds 40 percent.

I

McDonald claims the court erred in concluding that the "further studies" requirement was a proper basis for denial. He argues that since his application would have been denied on the basis of the 40 percent slope prohibition, additional studies would have been a futile act, and thus, not a proper basis for denying his application. The exhaustion of administrative remedies doctrine states that "when an adequate administrative remedy is provided, it must be pursued before the courts will intervene." *Orion Corp v. State*, 103 Wn.2d 441, 456, 639, P.2d 1369 (1985), *cert. denied*, 486 U.S. 1022 (1988). Futility is an exception to the doctrine and is based on the rationale

that courts will not require vain and useless acts. *R/L Assocs., Inc. v. Seattle*, 61 Wn. App. 670, 677, 811 P.2d 971, *review denied*, 117 Wn.2d 1024 (1991). McDonald cites no authority for his proposition that the existence of an alternative ground for denying a short plat application invalidates another ground for the denial.[3]

Review of a writ of certiorari is governed by RCW 7.16 and is on the record before the Hearing Examiner. *Chaussee v. Snohomish Cy. Coun.*, 38 Wn.App. 630, 636, 689 P.2d 1084 (1984). Legal issues are reviewed de novo under the contrary-to-law standard, and factual issues are reviewed for competency and sufficiency of the evidence. RCW 7.16.120(4)(5). We note that the statute governing plats, subdivisions, and dedications, provides that "[a]ny decision approving or disapproving any plat shall be reviewable for unlawful, arbitrary, capricious or corrupt action or nonaction." RCW 58.17.180. This court has previously held that "[t]he last two subsections [of RCW 7.16.120(4)(5)] govern the court's review of factual matters and encompass, essentially, the arbitrary and capricious standard used in nonwrit cases." *Ishmael v. King Cy.*, 68 Wn.App. 466, 469, 843 P.2d 554 (1993); *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn.App. 614, 617-18 n.4, 829 P.2d 217, *review denied*, 120 Wn.2d 1008 (1992).[4] Thus, we determine legal issues de novo using

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[3] McDonald's motion to supplement the record is denied. The County conceded that his appeal was property before the Hearing Examiner and the Examiner addressed the special studies requirement.

[4] In *Freeburg v. Seattle*, 71 Wn.App. 367, 371, 859 P.2d 610 (1993), the court seriously questioned Ishmael, stating "[t]here is a plain and important distinction between the statutory

the contrary-to-law standard and evaluate factual issues using the substantial evidence test.

McDonald argues the County cannot meet the minimum burden of proof required to request the studies. He concedes the County may request special studies when sensitive areas are present, but argues it was irrational for the County to conclude his property was in a sensitive area.

King County may not approve a short plat unless there are written findings that appropriate provisions are made for the public health, safety and general welfare. RCW 52.17.060; 58.17.110(2)(a); KCC 19.26.120(A)(3). Authority to require special studies is found in the version of the King County Sensitive Areas Ordinance (SAO)

'substantial evidence' standard and the 'arbitrary and capricious' standard applied by case law under the prior statutory language. In view of the statutory language the proper standard seems beyond dispute." *Freeburg* at 371. *Ishmael*, at 469. *Freeburg* was a variance case; the arbitrary or capricious standard was addressed to the prior version of RCW 7.16.120(5) which stated: "If there was such proof, whether rendered in an action in a court, triable by a jury, as would be set aside by a court, as against the weight of the evidence." Former RCW 7.16.120(5). *Freeburg*, at 371-72. We believe that *Ishmael* is the better analysis here. The arbitrary or capricious standard embraces circumstances where a tribunal makes legal conclusions which are unsupported by the facts or it reaches factual findings unsupported by the record. An administrative decision is arbitrary and capricious when it reflects "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Kendall v. Douglass, Grant, Lincoln and Okanogan Countries Public Hospital Dist.* 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991).

in effect at the time of McDonald's short plat application. The SAO's purposes were:

> A. To protect sensitive areas by regulating their development;
>
> B. To protect the public from damage due to landslide, subsidence, or erosion; . . .
>
> C. To protect unique, fragile and valuable elements of the environment . . .

Former KCC 21.54.130, Ord. 4365 § 8 (1979). Contrary to McDonald's unsupported assertion, his property is located in a designated sensitive area, a Class III seismic hazard area. In reviewing a development permit on a site containing a Class III seismic hazard area, BALD may require special studies whenever there is a reasonable possibility of significant erosion, landsliding or seismic hazard". KCC 21.54.150(A)(B), Ord. 4365 § 10 (1979). Accordingly, BALD had the authority to require the studies.

Moreover, the applicant has the burden of demonstrating that his plat application will adequately protect the public health, safety and general welfare.

> Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission. If the applicant can show that its plat, with the proper conditions and modifications, will comply with those laws, it will be approved. If not, it will be rejected and the process may begin again. RCW 58.17.140. The applicant bears the burden of complying fully with applicable land use requirements. *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 169-70, 759 P.2d 447 (1988).

Friends of the Law v. King Cy., 123 Wn.2d 518, 529, 869 P.2d (1994).

Here, the presence of steep slopes on the site, testimony of neighbors and reviews of BALD personnel indicated a serious concern about possible wetlands; landslide and erosion risks, and McDonald's ability to meet county road standards. At the hearing, McDonald attempted to use a report prepared by J. Keith Cross, a geotechnical engineer, in October 1987. Cross did not evaluate public safety concerns associated with developing McDonald's property. The report evaluated Levy's property located on flat ground above McDonald's sloped parcel. A portion of the Cross study was performed on the McDonald property, and the report addressed soil stability in its then present condition. The report did not address issues associated with removing vegetation, cutting roads, creating impervious road surfaces, and developing home sites on the McDonald property. As such, the 3-year-old report could not serve as a valid basis for the Hearing Examiner to approve the short plat.

McDonald submitted a Level I drainage assessment conducted by D.R. Strong, P.E. The report noted there were no problems or potential problems related to storm drainage for a quarter of a mile from the project site and noted no evidence of groundwater outcroppings. McDonald attempted to use the Strong report to show that erosion and landslides were not a problem. However, that report was solely a review of existing drainage of the area and did not address drainage or slope stability after the contemplated development.

McDonald testified regarding the soil composition and stability of the slopes. King County asserts this court should dismiss McDonald's testimony because he was not an expert under ER 702. However, Washington Rules of Evidence generally do not apply in administrative hearings. *Shoemaker v. Bremerton*, 109 Wn.2d 504, 510, 745 P.2d 858 (1987). When asked about his qualifications McDonald cited his 40 years experience as a homebuilder. This experience as a homebuilder may not qualify him in the sense that a geotechnical engineer would be, but that question goes to the credibility and weight of the evidence rather than admissibility. In order to evaluate factual questions appellate courts "[view] the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *County of Pierce*, 65 Wn.App. at 618; *Russell v. Department of Human Rights*, 70 Wn.App. 408, 421, 854 P.2d 1087 (1993), *review denied*, 123 Wn.2d 1011 (1994). Apparently, the Hearing Examiner found that McDonald's soil stability testimony was not credible. Thus, there was a need for the special studies to address the issues regarding wetlands, seismic, landslide, and erosion hazards, and potential problems with meeting the County's road standards.

McDonald attempts to debunk the need for special studies. That is not the standard. The applicant bears the burden of showing that the application complies fully with all land use requirements. *See Friends of the Law*, 123

Wn.2d at 528. McDonald did not provide a sufficient basis for approval of his short plat application.

II

McDonald claims the court erred in failing to find the administrative guidelines pertaining to 40 percent slopes are unauthorized, inapplicable, and contrary to law.[5] He argues the guidelines exceed the authority granted BALD by the County Council, apply to subdivisions not short subdivisions, and are not contained in a regulation adopted by ordinance as required by RCW 58.17.060.

> Certain well settled principles govern the scope of an administrative agency's rule-making authority. First, an agency has only those powers either expressly granted or necessarily implied from statutory grants of authority. Second, an agency does not have the power to promulgate rules that amend or change legislative enactments. Third, rules may "fill in the gaps" in legislation if such rules are "necessary to the effectuation of a general statutory scheme." Fourth, administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented. Fifth, a party attacking the validity of an administrative rule has the burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation.

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[5] The 40 percent slope prohibition is contained in King County's Administrative Guidelines – Building Setbacks from Hazardous Slopes on Plats and Short Plats (February 1, 1987).

(Citations omitted). *Green River Comm'ty College, Dist. 10 v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980).

McDonald is incorrect. King County's short subdivision code states:

> The preliminary decision shall be based on . . .
>
> > [c]onformance with adopted county and state rules and regulations in effect on the date the complete application was received. Such rules and regulations are not limited to . . . administrative rules adopted pursuant to K.C.C. 2.98 to implement any such code or ordinance provision.

KCC 19.26.120(B)(1). The County zoning code is designed as "one means of carrying out the general purposes set forth and defined in the comprehensive plan of King County" KCC 21.02.010. The County's Comprehensive Plan was adopted and updated by county ordinance. KCC 20.12.010. BALD is empowered to make rules implementing policy choices made by the King County Council in passing ordinances. KCC 2.98.025, .030(B)(4). The County SAO in effect at the time of McDonald's application provided that BALD may deny a short plat application on property containing a sensitive area to "carry out the purposes of this ordinance, the policies of the King County Comprehensive Plan, and other adopted county plans, policies and regulations. Former KCC 21.54.150A and .160, Ord. 4365 § 10, 11 (1979). King County through its Comprehensive Plan, its short plat, and sensitive areas ordinances, authorized BALD to adopt rules implementing the policies of its comprehensive plan.

The County's Comprehensive Plan states that "[a]s slope increases, development intensity, site coverage and vegetation removal should decrease to mitigate problems of drainage, erosion, siltation and landslides. Slopes of 40 percent or more should be retained in a natural state, free of structures and roads." King county Comprehensive Plan, ch. 4, policy D-305 (April 1985). King County has adopted a policy of not allowing development of slopes exceeding 40 percent.

Both parties agree that, if applicable, the building setback guidelines prohibit development on slopes exceeding 40 percent. McDonald admits that the guidelines do appear, facially, to apply to short plats. He does not deny the County's assertion that his entire property has slopes exceeding 40 percent and is in a Class III landslide area. Instead he asserts that the guidelines are intended to implement only the portions of the SAO relating to severe landslide hazards, and no landslide hazard exists on his property. Nevertheless, the guidelines explicitly state:

> These guidelines regulate hazardous slopes and areas adjacent to them that are contained in proposed plats and short plats. These hazardous slopes consist of either:
> 1. Areas mapped as Class III Landslide Hazards on the King County Sensitive Area Folio or identified as such under K.C.C. 21.54.140.
> 2. Slopes 40% or steeper. . . .

The authority for these guidelines is contained in KCC 21.54.140-150 and the 1985 Comprehensive Plan policies E-102-3, 304-07. Since the guidelines apply to both areas mapped as Class III landslide hazards and to 40 percent slopes, they apply to McDonald's short plat application.

McDonald argues that BALD's 40 percent rule exceeds the authority of RCW 58.17060 because they were not adopted by ordinance, as, he asserts, is required by the statute. The proper construction of a statute is a question of law; review id de novo with the primary goal of giving effect to the Legislature's intent. *See Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wn.2d 439, 443-45, 842 P.2d 956 (1993). If the statute is unambiguous, its meaning is derived from the statutory language alone. *See State v. Johnson*, 199 Wn.2d 167, 172, 829 P.2d 1082 (1992). A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

Prior to the 1974 revision of RCW 58.17.060 there was no requirement in state law that short plats be reviewed by local government. Laws 1974, 1st Ex. Sess., ch. 134 § 3; Laws of 1969, ch. 271, § 3. The statute requires King County to

> adopt regulations and procedures, and appoint administrative personnel for the summary approval of short plats and short subdivision or alteration or vacation thereof. . . . Such regulations shall be adopted by ordinance. . . .

RCW 58.17.060. Thus, the County must have regulations and a procedure for acting on short subdivision applications in a summary fashion, and they must be adopted by ordinance. Title 19 of the King County Code implements RCW 58.17.060. A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly stated. *Stegriy v. King Cy. Bd. of Appeals*, 39 Wn.App. 346, 357, 692 P.2d 183 (1984). Nothing in RCW 58.17.060 indicates any intent to invalidate the

County's delegation of rule-making authority to BALD to implement its zoning code and the purposes of its comprehensive plan as they apply to short plats.

III

McDonald claims the set-back rule is too broad and unduly oppressive because it flatly prohibits short plats on slopes exceeding 40 percent, and it has been selectively applied to his property. He notes that the County allows residential and commercial building permits on previously subdivided property that exceeds 40 percent in slope. A quasi-judicial land-use decision violates substantive due process "if the decision to deny the permit is 'invidiuos or irrational' or 'arbitrary or capricious' ". *Lutheran Day Care v. Snohomish Cy.*, 119 Wn.2d 91, 125, 829 P.2d 746 (1992). *cert. denied*, ___ U.S. ___, 113 S. Ct. 144, 122 L. Ed. 2d 353 (1993). A government regulation does not violate substantive due process if: (1) the regulation aims to achieve a legitimate public purpose, (2) the means adopted are reasonably necessary to achieve that purpose, and (3) the regulation is not unduly oppressive on the property owner. *Robinson v. Seattle*, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). The substantive due process inquiry is a deferential inquiry. "If the court can reasonably conceive of a state of facts warranting the legislation, those facts will be presumed to exist. Moreover, the court will presume that the legislation was passed with reference to those facts." *Tekoa Constr., Inc. v. Seattle*, 56 Wn.App. 28, 34, 781 P.2d 1324 (1989), *review denied*, 114 Wn.2d 1005 (1990), citing *Duckwork v. Bonny Lk.*, 91 Wn.2d 19, 27, 586 P.2d 860 (1978).

McDonald admits that "[t]he County has a legitimate interest in protecting the public from the evils of building in hazardous areas." Development on steep hillsides poses serious landslide, erosion, and drainage risks. County regulations requiring an applicant demonstrate that appropriate provisions are made for the public health, safety and general welfare as required by RCW 58.17.060, 17.110, KCC 19.26.120, and its setback guidelines are aimed at achieving a legitimate public purpose.

It is apparent that the creation of new building lots on steep hillsides increases the level of development and risks to public health and safety. As more natural vegetation is disturbed to put in roads, driveways, buildings, and other impervious surfaces, the risks of landslide, erosion, and drainage problems increase. King County's restriction on creating new lots on very steep hillsides does not prohibit all development on existing lots. It reduces the danger to the public by limiting the level of development. Thus, under the deferential standard of review, the means selected satisfies the reasonable means prong of the substantive due process test.

The unduly oppressive inquiry requires a balancing of the public interest in adopting the regulation against the interests of the regulated landowner in being free from arbitrary government action. *Robinson*, 119 Wn.2d at 51. The review court looks at "the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner." Robinson, at 51-52, quoting *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990). The Robinson court also noted a set

of nonexclusive facts to be used by the reviewing court for guidance in performing the balancing.

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary and permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

(Citations omitted). *Robinson*, at 52, quoting *Presbytery*, at 331.

The risks associated with development on steep hillsides, in urban areas such as here, are very serious. Landslides on steep slopes threaten lives and extensive property damage. Restricting development substantially reduces those risks. On the other side of the equation, McDonald can still receive a building permit to construct a single family home on his existing lot, if he can show it can be built safely. He has not come forward with evidence documenting the amount of loss he would incur by having one building lot instead of four.[6] Further,

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[6] The County admits that it is likely that McDonald will experience a loss, but correctly asserts that simply demonstrating a parcel of land would be more valuable if not subjected to an otherwise valid regulation does not demonstrate a regulation is beyond the pale of acceptable legislative choices.

McDonald should have known when he bought the property 30 years ago that this hillside was extraordinarily steep and would involve public health and safety issues, not implicated in development proposals on flat ground.[7] The County has had a consistent policy of restricting development on steep hillsides for the past 30 years. King County Comprehensive Plan, policy D-5, 8, 9, at 114, 116 (1964). King County's short plat guidelines are not unduly oppressive and do not deprive McDonald of due process of law.

The Hearing Examiner's denial of McDonald's short plat application was not "invidious or irrational" or "arbitrary or capricious" because it was based on clearly established policy. Denial of the short plat was the only rational decision that could be reached given: (1) McDonald's refusal to provide evidence demonstrating it would be safe to develop the property, and (2) the prohibition against approval of short plats of property exceeding a 40 percent slope.

We affirm.

Webster, J.

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[7] This fact is evidenced by his previous subdivision not including this parcel and his short plat application just 1 week before the new SAO went into effect, explicitly prohibiting development on slopes exceeding 40 percent. KCC 21.54.250.

WE CONCUR:

Becker, J.

McDonald v. King County, No. 33547-2-I

AGID, J. (concurring in part and dissenting in part) – I concur in the result because McDonald refused to supply the studies King County could lawfully require in order to determine whether the property could safely support structures on four lots without impermissible environmental damage. Former KCC 21.54.150A and .160. Without these studies, McDonald could not reasonably expect the County to evaluate his short plat application under the version of the Sensitive Areas Ordinance in effect when he submitted his application. Having created this problem, McDonald cannot now complain that his application was improperly denied on that basis.

However, I have significant reservations about BALD's administrative rule creating a conclusive presumption that prohibits short plats on any property with a slope of 40 percent or greater.[8] The validity of such a rule is especially questionable in view of the facts that owners of property on 40 percent slopes who have

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[8] I have the same concerns about the Sensitive Areas Ordinance adopted by the County after McDonald submitted his application for this short plat. However, because it was to adopted at the time of application and McDonald therefore had a vested right to have his application considered under the laws in effect at the time of application, we cannot properly consider the validity of the ordinance in this case. *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).

already received approval of a short plat are permitted to develop despite the County's stated concern, used to justify the current prohibition on such short plats, that such areas are so hazardous as to justify an absolute prohibition on such development.

Conclusive presumptions are and long have been disfavored under the Due Process Clauses of the fifth and fourteenth amendments to the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441, 446, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973). This is because irrefutable presumptions operate to prohibit those burdened by them from having a fair opportunity to rebut the fact or facts presumed by the legislative body. *Heiner v. Donnan*, 285 U.S. 312, 329, 76 L. Ed. 2d 772, 52 S. Ct. 358 (1932). Where a conclusive presumption also operates to deprive one of a federal constitutional right without a hearing, it violates substantive due process, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974), the Equal Protection Clause, *Stanley v. Illinois*, 405 U.S. 645, 649, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), and procedural due process *Bell v. Burson*, 402 U.S. 535, 539, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971).

The right to use one's property free of arbitrary government regulation is a federal constitutional right. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 12, 21, 829 P.2d 765 (Fourteenth Amendment limits government's "ability to pass unreasonable or irrational laws which deprive individuals of property rights"), *cert. denied*, 113 S. Ct. 676 (1992). Where a statute or ordinance unreasonably denies property rights, it is invalid and the owner may be entitled to compensation under 42 U.S.C. § 1983 for the

resulting denial of his or her right to substantive due process. *Sintra,* 119 Wn.2d at 21.

In order to establish that a regulation constitutes a denial of substantive due process, the owner need not show that no viable use of property remains. *Sintra,* 119 Wn.2d at 21. Rather, the owner need only show that the "interference with property rights was irrational or arbitrary." *Sintra,* 119 Wn.2d at 21; *Lutheran Day Care v. Snohomish Cy.,* 119 Wn.2d 91, 125, 829 P.2d 746 (1992), *cert. denied,* 113 S. Ct. 1044 (1993); *Robinson v. Seattle,* 119 Wn.2d 24, 51-52, 830 P.2d 318, *cert. denied,* 113 S. Ct. 676 (1992). Conclusive presumptions are inherently arbitrary because they are not the least restrictive alternative means to achieve a legitimate state interest, *Dunn v. Blumstein,* 405 U.S. 330, 353, 31 L. Ed. 2d 274, 93 S. Ct. 995 (1972), or because they sacrifice constitutional rights to administrative convenience, *Stanley,* 405 U.S. at 658.

The BALD regulation now operates to deny any owner of property with a 40 percent or greater slope even an opportunity to demonstrate in a fair and impartial hearing that approval of a short plat and development on the lots created could be done in a safe and environmentally responsible manner. Yet those whose plats were approved before BALD decided to adopt this policy are still permitted to build on slopes with the same characteristics. This distinction is entirely arbitrary. It also belies any claim that the rule is actually necessary for any proper police power purpose. Why don't 40 percent slopes on lots created before the rule raise the same concerns as those created after it? The 40 percent rule establishes just the kind of irrebuttable presumption that both the federal and state courts have concluded violates

the owner's substantive due process rights. I therefore cannot agree with the portion of the majority opinion approving the 40 percent policy or regulation.

Agid, J.

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD McDONALD Appellant, v. KING COUNTY; OFFICE OF THE KING COUNTY ZONING AND HEARING EXAMINER; KING COUNTY BUILDING AND LAND DEVELOPEMENT DIVISION a political subdivision of the State of Washington, Respondents.	NO. 33547-2-1 ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING CHANGE IN OPINION

Appellant, Donald McDonald, appellant, having filed a motion for reconsideration of the opinion filed May 30, 1995, respondent having answered said motion, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration be, and the same hereby is denied, and it is hereby

ORDERED that the opinion of this court in the above entitled case filed be changed as follows:

> Replace the word "landslide" with "seismic" on page 1, second paragraph, fourth line of the opinion to read:
>
> He does not deny the County's assertion that his entire property has slopes exceeding 40 percent and is in a Class III *seismic* area.

DATED this 30th day of August, 1995.

FOR THE PANEL:

Webster, J.
Presiding Judge
December 18, 1991

APPENDIX D

OFFICE OF THE ZONING AND
SUBDIVISION EXAMINER
KING COUNTY, WASHINGTON
300 Prefontaine Building
110 Prefontaine Place South
Seattle, Washington 98104

REPORT AND DECISION ON AN APPEAL FROM THE SHORT SUBDIVISION ADMINISTRATOR.

SUBJECT: Building and Land Development File No. S90S0392

Proposed Short Plat of DONALD McDONALD

Lot 7 Block 1 – 1st Addition to Lake Forest Park less portion in Plat of Forest Park Glen

SUMMARY OF RECOMMENDATIONS:

Division's Preliminary:	Deny the appeal
Division's Final:	Deny the appeal
Examiner:	Deny the appeal

PRELIMINARY REPORT:

The Building and Land Development Division's Preliminary Report on Item No. S90S0392 was received by the Examiner on August 15, 1991.

PUBLIC HEARING:

After reviewing the Building and Land Development Division's Report, examining available information on file with the application and visiting the property and surrounding area, the Examiner conducted a public hearing on the subject as follows:

The hearing on Item No. S90S0392 was opened by the Examiner at 9:15 a.m., August 29, 1991, in Room No. 2, Building and Land Development Division, 3600 – 136th

Place S.E., Suite A, Bellevue, Washington, and adjourned at 12:50 p.m. The hearing continued at 1:35 p.m., November 13, 1991, and closed at 1:55 p.m. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the Zoning and Subdivision Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Applicant/appellant:	Donald McDonald 6139 N.E. Bothell Way Seattle, WA 98155
STR:	3-26-4
Location:	Lot 7 Block 1 – 1st Addition to Lake Forest Park less portion in Plat of Forest Park Glen
Zoning:	RS 9600
Acreage:	1.22
Number of Lots:	4
Typical Lot Size:	9,200 – 17,500
Proposed Use:	Single-family residence
Sewage Disposal:	N.E. Lake Washington Sewer & Water District
Water Supply:	N.E. Lake Washington Sewer & Water District

2. The appellant is the developer of Forest Park Glen, a subdivision in northeast King County. On November 20, 1990, he submitted a short plat application to subdivide 1.22 acres which were an exception to his

original plat. Following its review, the Building and Land Development Division determined that there were steep slopes present on the property and requested a geotechnical report to address seismic and landslide hazards, together with an engineering assessment of design construction problems and potential hazards associated with the construction of N.E. 201st Street, which would be needed to serve the property (Exhibit No. 6). The applicant declined to provide the requested studies, and on June 18, 1991, the preliminary approval was denied, to enable the applicant to appeal the Building and Land Development Division's determinations on this matter (Exhibit No. 11).

3. Preliminary approval has been denied on the basis of the Sensitive Areas Ordinance and the King County Slope Density Guidelines (Exhibit No. 8), which provides that there will be no development on slopes of 41% or more. The appellant has not denied that the proposal would be in violation of the Slope Density Guidelines, but argues that it is technically feasible to build on the site and that approval has been given to subdivisions on steep slopes throughout the County. At the applicant's request, the hearing was continued for 30 days to enable discovery of preliminary approvals of subdivisions on slopes of 40% or more. No such subdivision activity was found to exist by the applicant, though examples of building on steep slopes on existing tax lots were brought forth. The Building and Land Development Division stated throughout the proceedings that it has a policy of approving permits on existing legal lots, but does not approve new subdivisions of land on steep slopes. Adjacent residents have also expressed concern with the stability of the slopes in question, stating that they have been subject to slippage in the past.

4. KCC 19.26.120 provides in part as follows:

   A. Following the acceptance of a complete application, or following the conclusion of any applicable SEPA review and appeal period set forth in KCC 20.44, County Environmental Procedures the division shall:

   * * *

   B. The preliminary decision shall be based on the following factors:

      1. Conformance with adopted county and state rules and regulations in effect on the date the complete application was received. Such rules and regulations include, but are not limited to: R.C.W. 58.17; SEPA (R.C.W. Ch. 43.21C) as implemented by K.C.C. Ch. 20.44; K.C.C. Title 21, Zoning; K.C.C. 14.42, Road Standards; K.C.C. 9.04, Surface Water Runoff; K.C.C. Title 25, Shoreline Management; K.C.C. 19.26, Short Subdivisions; K.C.C. Title 17, Fire Code; administrative rules adopted pursuant to K.C.C. 2.98 to implement any such code or ordinance provision; King County board of health rules and regulations; and county approved utility comprehensive plans; and conformance with applicable private restrictions and covenants.

   * * *

5. Any conclusion in this Report and Decision which should be deemed a finding of fact is hereby adopted as such.

CONCLUSIONS:

1. The Examiner has jurisdiction over the parties and subject matter of this proceeding.

2. It is my conclusion that the appeal must be denied for the reasons set forth below. It is not denied that the appellant is in violation of King County Slope Density Guidelines which prohibit subdivisions of land on slopes greater than 40%. This is in recognition of the potential hazardous conditions that might exist on such slopes. It also protects purchasers of future lots who might otherwise be unaware of hazardous conditions on steep properties. In this instance the appellant has not performed the requested engineering studies for the building and Land Development Division's experts to make a determination regarding the stability of the specific site. This, of course, was the applicant's choice. The County's Slope Density Guidelines are a longstanding policy which is entitled to substantial weight in consideration of the instant appeal. As set forth above, KCC 19.26.120(B) provides that short plats must be in conformance with adopted County rules, which include the Slope Density guidelines that have been administered by the County in a manner consistent with this decision for a number of years. The appellant has failed to demonstrate that the County has ever approved a subdivision under the conditions present on the subject property. Though it is true that building permits have been issued for existing legal lots with steep slopes, the same option is available to this appellant. The appellant argues that the Slope Density Guidelines refer to subdivisions which are distinct from short subdivisions; however, this would not be controlling inasmuch as the specific language of 19.26.120 requires conformance to applicable regulations. Preliminary approval could not be granted at any rate, because the applicant has chosen not to perform necessary studies.

DECISION:

The appeal is DENIED.

ORDERED this 18th day of December, 1991.

Robert E. Beaty
Deputy Zoning and
Subdivision Examiner

TRANSMITTED this 18th day of December 1991, by certified mail to the following parties of record:

Benedict, Robert
Cross, Keith, P.E.
De Yager, Stan & Diane
Eames, Vicki
Fox, Herbert & Robin
Kegal, Mr. & Mrs.
Lambroth, Sharon
McDonald, Donald
Millerick, Rick
Nicholson, Jack
Paynter, Mr. & Mrs.
Rafter, Mr. & Mrs. Ron
Rice, Richard/Smith, Rosemary
Boyce, Thomas & Terrill
D.R. Strong Consulting Eng.
Dutson, Keith
Forseth, Linda & Paul
Hyppa, Terry
Korthuis, Ronald & Kathleen
Levy, Barry
McDonald, Scott
Mulvihill, Mr. & Mrs.
Overstreet, Karen
Pearson, Mr. & Mrs. Ted
Resident
Seeman, Karl

TRANSMITTED this 18th day of December, 1991, to the following:

Crofut, Sheila, Environmental Division
Gruger, Audrey, King County Council
Haemmerle, Howard, Building and Land Development Division
Jordan, Cheryl, Building and Land Development Division
Reynolds, Lydia, Building and Land Development Division
West, Larry, Building and Land Development Division

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding appeals of short subdivision. The Examiner's decisions shall be final and conclusive unless within 20 days from the date of the decision an aggrieved party or person applied for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the decision.

MINUTES OF THE AUGUST 29, 1991 AND NOVEMBER 13, 1991 PUBLIC HEARINGS ON BALK FILE NO. S90S0392 – McDONALD SHORT PLAT:

Robert E. Beaty was the Hearing Examiner in this matter. Participating in the hearing were Lydia Reynolds, Howard Haemmerle, Donald McDonald, Scott McDonald, Richard Rice, Jack Nicholson, Barry Levy, and Ted Pearson.

The following exhibits were offered and entered into the records:

August 29, 1991:

Exhibit No. 1	Building and Land Development Division's Preliminary Report to the Examiner dated August 29, 1991
Exhibit No. 2	Short subdivision application dated November 20, 1990 and denied on June 18, 1991
Exhibit No. 3	Copy(s) of Assessor maps showing the subject property and adjacent property ownership pattern. STR 3-26-4
Exhibit No. 4	Applicant's appeal letter, June 25, 1991

Exhibit No. 5	Applicable statutes/codes
Exhibit No. 6	BALD letter to applicant dated May 2, 1991
Exhibit No. 7	Memo from Technical Services to Sheila Crofut (SEPA Planner) dated April 7, 1991
Exhibit No. 8	Slope-Density Guidelines
Exhibit No. 9	Administrative Guidelines – Building Setbacks from hazardous Slopes, February 1987
Exhibit No. 10A-D	Letters to BALD from neighbors regarding appeal
Exhibit No. 11	BALD's denial letter to Mr. McDonald dated June 18, 1991
Exhibit No. 12	Additional letters (10) to BALD from neighbors regarding appeal, received after mailing date of Report
Exhibit No. 13	November 1978 Sensitive Areas Map Folio excerpts
Exhibit No. 14	Kroll map NW 1/4 3-26-4, with highlights
Exhibit No. 15	Aerial photo map 1958
Exhibit No. 16	Geotech report by Keith Cross, PE, October 1987
Exhibit No. 17	Diagram of short plat
Exhibit No. 18	D.R. Strong Report dated November 1990
Exhibit No. 19	Photos of Nicholson property taken 1964
Exhibit No. 20	USGS map of area

November 13, 1991:

Exhibit No. 21	Letter dated November 6, 1991 from Dr. & Mrs. Thomas R. Boyce

APPENDIX E

King County
Building & Land Development Division
Parks Planning and Resources Department
450 King County Administration Bldg.
300 Fourth Avenue
Seattle, Washington 98104

February 1, 1987

ADMINISTRATIVE GUIDELINES BUILDING SETBACKS FROM HAZARDOUS SLOPES ON PLATS AND SHORT PLATS

A. Applicability

These guidelines regulate hazardous slopes and areas adjacent to them that are contained in proposed plats and short plats. These hazardous slopes consist of either:

1. Areas mapped as Class III Landslide Hazards on the King County Sensitive Areas Folio or identified as such under K.C.C. 51.54.140.

2. Slopes 40% or steeper with a grade difference (top to bottom) of 10′ or greater.

B. Authority

The procedure and restrictions adopted by these guidelines satisfy the requirements of Section 21.54.140-150 of the King County Zoning Code for review and approval of development applications that impact Class III landslide hazard areas. They also implement relevant portions of policies E-102, E-103, and E-304-307 of the 1985 Comprehensive Plan.

C. Definitions

1. Native Growth Protection Easements (NGPE): a restrictive area where all native, pre-development vegetation shall not be disturbed or removed except for diseased or decaying trees posing a threat to life or property, in order to protect the hazardous slopes specified in Section A above. This restriction shall be shown on the recorded plat or short plat.

2. Building setback lines (BSBL): between these lines and adjacent native growth protection easements, structures, fills, or obstructions (including but not limited to decks, patios, sidewalks and driveways, outbuildings, or overhangs beyond 18 inches) shall be prohibited (exceptions noted in paragraph E.2. below). Such lines shall be shown on recorded plat or short plat, by delineating their distance at each property boundary from an adjacent property corner and by indicating their distance from an approximately or precisely located natural feature (typically, the top or toe of slope).

D. Basic restrictions (no additional geotechnical information provided by applicant)

1. Building setback lines (see attached drawing)

a. Top-of-slope

(I) Location of the building setback line is lesser of 50′ from the top of hazardous slopes, namely those specified in Section A above, or the highest point at which a 4:1 (horizontal:vertical) line projected up from the bottom of the slope intersects the ground surface.

(II) Where active erosion is occurring at the bottom of the slope (such as wave action or river undercutting), setback may be increased to 75′ at the discretion of BALD staff.

b. Toe-of-slope

The building setback line is located at horizontal distance from the base of slope equal to the total vertical height of the slope specified in Section A above, up to a maximum of 50′, provided:

(I) Any setback less than 50′ must itself lie on a slope of 15% or flatter.

(II) Areas below discrete drainage channels or other alluvial run-out zones may require setbacks greater than 50′ at the discretion of BALD staff.

2. Native growth protection easements (see attached drawing)

a. All native growth on slopes specified in Section A above shall be protected in a NGPE. Pre-application removal of such vegetation may increase mandatory setback distances or preclude any adjacent development.

b. The NGPE shall be extended above slopes specified in Section A to include adjacent areas 25% or steeper, up within 10′ of the building setback line established by paragraph D.1.a above.

E. Reduction of basic setbacks and native growth areas (see attached drawing)

1. Top-of-slope setbacks may be reduced to a minimum of 25′ and toe-of-slope setbacks reduced to

a minimum 10′, and the area covered by the NGPE may be restricted only to the slopes specified in Section A above, upon review and approval by BALD of a special study prepared by a geotechnical consultant retained by the applicant.

Such a study must document:

a. The lack of observed or likely landslide features on the slope or on equivalent, adjacent slopes; and

b. Subsurface materials, stratigraphy, and groundwater conditions favorable to longterm stability.

2. A separate light-structure building setback line for overhangs and minor structures such as decks, patios, driveways, and walkways may be approved to within 10′ of the NGPE upon BALD review and approval of a special study as above. In addition to satisfying the requirements of Section E.1., the special study must recommend construction procedures to insure that no impact will occur to any area within 10′ of the NGPE and demonstrate that the structure will in no way increase or concentrate surface water over the top of the slope.

3. Setback requirements may be waived entirely for slopes with a grade difference of less than 20′, upon review and approval by BALD of a special study that documents stable slope conditions and recommends building design and construction procedures.

SLOPE – DENSITY – RATIO

RESIDENTIAL DENSITY GUIDELINES FOR SLOPING GROUND

The following table represents the guidelines for lot area and lot width used by the Subdivision Technical Committee when reviewing Subdivision applications IAW the King County Comprehensive Plan. Variations may be approved on the basis of special evidence, (e.g. soils reports, seismic data, etc.).

Maximum Slope of Building Site Area*	Minimum Req'd** Lot Area (Minus Roads & Utilities) - Graduated -	Minimum Req'd Lot Width	Max. Units Per Acre	KC Comp. Plan Policy
	(in square feet)			
0 - 15%	7,200	60'	5/A	D-11 D-5
16 - 20%	8,000 - 15,000	70'	3/A	SS-3 D-5
21 - 25%	15,500 - 20,000	80'	2.5/A	SS-3
26 - 30%	20,500 - 35,000	100'	2/A	D-9
31 - 40%	35,500 - Over	135'	1/A	D-8
41% - Over***	No Development	–	0/A	SS-1

* The slope of the Building Site Area is measured perpendicular to the topographic lines shown on the preliminary plat drawn to a scale of at least 1" = 100' and at intervals of not more than 5' in elevation. The Building Site Area of a lot is considered to be an area of approximately 5000 square feet which includes the area of a house, patios and driveways cleared yard areas, etc.

** All lots must first meet minimum area requirements of the applicable zone district. Required area in excess of the zone requirement may be assigned to the lot, or, may be assigned to permanently dedicated open space if the additional open space lies adjacent to the lot requiring ___ and effectively minimizes the impact of lot development on the slope.

*** In general, land of this slope should be placed in open space, or left in tracts of 5 acres or more for use as Forest-Recreation property.

APPENDIX F

ENVIRONMENT AND OPEN SPACE

GENERAL POLICIES

E-103 King County should prevent development on lands where development would pose hazards to life, property, important ecological functions or environmental quality. Due to severe natural limitations, the following natural features should remain undeveloped:

a. Floodways of 100-year floodplains;

b. Slopes with a grade of 40 percent or more;

c. Severe landslide hazard areas (Class III);

d. Wetlands rated as Unique/Outstanding or Significant; and

e. Coal mine hazard areas.

B. Steep Slopes, Landslide and Erosion Hazards

Hazards associated with hillside development are a function of slope and soil conditions. On slopes greater than 15 percent, landslide and erosion hazards increase dramatically. Slopes over 40 percent are almost always hazardous for development and may slide or erode. Steep slopes combined with impermeable subsurface materials such as clay are subject to severe landslide hazards. Surface and groundwater seeping through permeable materials increases the risk. Sloping areas of certain soil types also can create severe erosion. Steep slopes in King County where severe landslide hazards and erosion hazards are likely to exist are shown in Figures E-2 to E-4 at the end of this section.

E-304 Land uses on steep slopes should be designed to prevent property damage and environmental degradation, and enhance greenbelt and wildlife habitat values.

E-305 As slope increases, development intensity, site coverage and vegetation removal should decrease to mitigate problems of drainage, erosion, siltation and landslides. Slopes of 40 percent or more should be retained in a natural state, free of structures and roads.

E-306 Severe landslide hazard areas should be free of development and roads.

E-307 In areas subject to erosion hazards, native ground cover should be retained or replaced after construction, special construction practices should be used, and allowable site coverage may need to be reduced to prevent erosion and sedimentation. Limitations on the time when site work can be done may also be appropriate.

APPENDIX G

21.54.250 Steep slope hazard areas – protection mechanisms and permitted alterations. Development proposals on sites containing a steep slope hazard area shall meet the requirements of this section.

A. Buffers.

1. A minimum buffer shall be established at a horizontal distance of 50 feet from the top, toe, and along all sides of slopes 40% or steeper. Existing native vegetation within the buffer area shall be maintained and the buffer shall be extended beyond these limits as required to mitigate landslide and erosion hazards, or as otherwise necessary to protect the public health, safety and welfare.

2. The buffer may be reduced to a minimum of ten feet when an applicant demonstrates to King County pursuant to a special study that the reduction will adequately protect the proposed development and the sensitive area.

B. Sensitive Areas Tracts. Any continuous steep slope hazard area and its buffers one acre or greater in size shall be placed in separate sensitive areas tracts in development proposals listed in K.C.C. 21.54.110.

C. Building Setback Lines. A building setback line will be established at a distance of 15 feet from the edge of the buffer.

APPENDIX H

21.54.060 Reasonable Use Exception.

A. If the application of this chapter would deny all reasonable use of the property, development may be allowed which is consistent with the general purposes of this ordinance and the public interest.

* * *

C. The examiner, in recommending approval of the reasonable use exception, must determine that:

1. Application of this chapter would deny all reasonable use of the property; and

2. There is no other reasonable use with less impact on the sensitive area; and

3. The proposed development does not pose an unreasonable threat to the public health, safety or welfare on or off the development proposal site; and,

4. Any alterations permitted to these sensitive areas shall be the minimum necessary to allow for reasonable use of the property.

APPENDIX I

21.54.150 Sensitive areas – Permit issuance.

A. Whenever a proposed development requires a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision, and one or more of the sensitive areas, as defined in KCC 21.04, is present on the site of the proposed development, the manager of the building and land development division may require special studies by qualified professionals as provided in Sections 21.54.130 through 21.54.180. The manager shall send written notification to the applicant whenever such studies are required. The county may approve with conditions or deny any such proposal to carry out the purposes of this ordinance, the policies of the King county Comprehensive Plan, and other adopted county plans, policies and regulations.

B. Whenever an erosion hazard area, Class III seismic hazard area, or fish-bearing waters are present, soil, geology, erosion and deposition, hydrology and/or water quality studies may be required if there is a reasonable possibility of significant erosion, landsliding, or seismic hazard or of damage to fish populations.

C. Any determination to require a study or any decision to approve with conditions or deny a building permit, grading permit, conditional use permit, variance, or short subdivision pursuant to this ordinance may be appealed in writing to the zoning and subdivision hearing examiner within ten days of written notification of such determination or decision. The hearing examiner

shall hold a public hearing and consider the appeal pursuant to KCC chapter 20.24; provided, that the decision of the hearing examiner regarding a requirement for studies shall be final. Any appeal filed pursuant to this section for actions relating to a building permit or short plat application shall be scheduled for public hearing and acted upon by the county as expeditiously as practicable.

D. Where studies may be required for building permit applications by an owner, lessee, or contract purchaser to construct a single family dwelling for his or her own use or applications for a short subdivision into two residential building lots, King County shall do a preliminary field investigation to determine the need for further studies or mitigating conditions. (Ord. 4365, section 10, 1979).

21.54.160 Sensitive areas – Class III landslide hazard areas. No building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision shall be granted for development on any Class III landslide hazard area unless King County determines, upon review of a soils study completed by a qualified soils engineer or engineering geologist, that the proposed development together with any required conditions to mitigate adverse environmental impacts can be safely accommodated on the site and is consistent with the purposes of this title. The soils study shall include specific recommendations for mitigating measures which should be required as a condition of any approval for such development. The recommendations may include, but are not limited to, construction techniques, design, drainage, or density

specifications, or seasonal constraints on development. The manager of the Building and Land Development Division may waive the requirement for special studies where sufficient information is otherwise available to approve, approve with conditions, or deny the development permit or approval in accordance with the purposes of this title, the King County Comprehensive Plan, and other adopted county plans, policies and regulations. (Ord. 4365, Section 11, 1979).

21.54.170 Sensitive areas – Wetlands. Wetlands located on the site of a proposed development requiring a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision shall not be disturbed or altered through excavation, filling, building, or other improvements unless King County determines, upon review of special studies completed by qualified professionals, that either:

A. the wetland does not serve any of the valuable functions of wetlands identified in Section 20.12.080 and Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions; or

B. the proposed development would preserve or enhance the wildlife habitat, natural drainage, and/or other valuable functions of wetlands as discussed in Section 20.12.080 or Army Corps of Engineers 33 CFR 320.4(b) and would be consistent with the purposes of this title. The required studies may include habitat value, hydrology, erosion and deposition, and/or water quality

studies. Such studies shall include specific recommendations for mitigating measures which should be required as a condition of any approval for such development. The recommendations may include, but are not limited to, construction techniques, or design, drainage or density specifications. The manager of the building and land development division may waive the requirement for special studies where sufficient information is otherwise available to approve, approve with conditions, or deny the development permit or approval in accordance with these criteria and the purposes of this title. If the application of this section would deny all reasonable uses of a property, development may be allowed which is consistent with the general purposes of this title and the public interest. (Ord. 4365, Section 12, 1979).

Supreme Court, U.S.
FILED
JUN 11 1996
CLERK

No. 95-1839

In The

Supreme Court of the United States

October Term, 1995

DONALD McDONALD,

Petitioner,

vs.

KING COUNTY,

Respondent.

Petition For Writ Of Certiorari
To The Washington Court Of Appeals, Div. I

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an administrative rule violate substantive due process when it prohibits the creation of new building lots on steep slopes and an appeal to an independent hearing examiner is provided?

2. Is there a rational relationship between health and safety concerns related to development on steep slopes and an administrative rule that prohibits the creation of new building lots on such steep slopes?

3. Does it violate procedural due process for a County to require studies addressing health and safety concerns related to development on steep slopes, where an appeal of the requirement to perform such studies is available and the applicant does not avail himself of such an appeal?

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I. STATEMENT OF THE CASE

On November 20, 1990, petitioner applied to King County for short plat approval to divide his property located on a very steep hillside into four building lots. Very early in the review process, King County identified several serious concerns regarding petitioner's proposed development, including the fact that petitioner's property was extraordinarily steep. Pursuant to established authority, King County required additional information from petitioner in the form of special studies addressing the significant health and safety concerns raised by his proposed development on the steep hillside.

Despite the availability of an administrative appeal of the requirement to do the special studies, petitioner did not appeal this requirement. Rather, petitioner refused to do the studies necessary to evaluate the health and safety risks associated with his development proposal. The King County Building and Land Development Division ("BALD") thereupon denied petitioner's short plat application.

Petitioner appealed the denial of his short plat application to the King County Hearing Examiner. The Hearing Examiner held a quasi-judicial public hearing. At this hearing, witnesses for the petitioner and county employees testified and were cross-examined with regard to petitioner's development proposal. Petitioner asked the Hearing Examiner to approve his short plat application, despite the fact that he had not provided the information necessary to evaluate the health and safety risks raised by his development proposal.

Petitioner attempted to rely on information produced at the hearing before the Hearing Examiner to show that four single-family homes could safely be built on his property. The information produced at the hearing did not even *address* the issues associated with removing vegetation and building four homes on a very steep hillside, let alone evaluate the complex technical issues raised by petitioner's development proposal in sufficient detail to substitute for the required special studies.

The Hearing Examiner denied petitioner's request to approve his short plat application on two grounds; both because it violated a rule adopted by BALD prohibiting short plats on slopes exceeding 40 percent, and because petitioner failed to provide the information necessary to evaluate whether petitioner's development proposal could be safely accomplished.

Petitioner appealed the Hearing Examiner's decision to King County Superior Court asking that this decision be reversed and his short plat approved. King County Superior Court, per Kathleen Learned J., upheld the Hearing Examiner's decision on both grounds. Petitioner moved for reconsideration. His motion for reconsideration was denied.

Petitioner appealed the trial court decision to the Washington State Court of Appeals, Division One, again asking that the Hearing Examiner's decision be reversed and that petitioner's short plat application be approved. The Court of Appeals denied his appeal. The Court of Appeals was unanimous in concluding that the Hearing Examiner appropriately refused to approve petitioner's short plat application in the absence of the information

necessary to evaluate the significant health and safety risks associated with petitioner's development proposal. The Court of Appeals also upheld, by a 2-1 vote, the Hearing Examiner's decision to deny petitioner's short plat application on the basis of BALD's rule prohibiting short plats on slopes exceeding 40 percent.

Petitioner moved the Court of Appeals for reconsideration of its decision. The Court of Appeals denied this motion.

Petitioner sought review of the Court of Appeals decision in the Washington State Supreme Court. Review was denied.

Petitioner now seeks review in this Court, pursuant to petition for writ of certiorari.

II. ARGUMENT

The instant case meets none of the criteria guiding this Court's exercise of discretion in deciding which cases to accept for review pursuant to a petition for writ of certiorari. A petition for writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10. There are no compelling reasons present in this case.

Petitioner asserts two reasons for the Court to grant review in this case, each of which is without merit.

A. The Washington Court of Appeals did not decide a federal question in a way that conflicts with decisions of this Court.

Petitioner asserts that the Washington Court of Appeals decided a federal question in this case in a way that conflicts with decisions of this Court. Petition for Writ of Certiorari, pp. 8-12. Petitioner alleges that the Washington Court of Appeals based its decision on an irrebuttable presumption, which "long have been disfavored under the Due Process Clauses . . . " Petition for Writ of Certiorari, p. 8. Petitioner's allegation is wrong on several counts.

First, the Washington Court of Appeals unanimously based its decision on an alternate ground of decision. Petitioner refused to demonstrate that his proposed development on a steep hillside could be safely accomplished – and yet petitioner sought approval of his short plat application. The King County Hearing Examiner acted appropriately in denying petitioner's application.

Every decision maker that has reviewed this matter (from the King County Hearing Examiner, to the trial court judge, to the Washington State Court of Appeals) has agreed that petitioner's request that his short plat application be approved without information demonstrating his proposed development could be safely accomplished was appropriately denied by King County. Even Judge Agid in the Washington State Court of Appeals, who dissented from part of the reasoning in the court's decision, concurred in the result that petitioner's short plat application was appropriately denied. Thus, a resolution of this case did not require that a federal

question even be decided, let alone decided in a way that conflicts with prior decisions of this Court.

Second, petitioner has not shown a property right protected under a substantive due process analysis. Petitioner seeks to subdivide his property into multiple building lots in order to increase the market value of the property. He has been denied no fundamental attribute of property ownership, such as the right to exclude others from his property or the right to put his property to an economically viable use. He simply wishes to maximize the amount of profit he can make on the development of his property. Petitioner asks this Court to second guess the policy choice made by King County in order to protect his "right" to make more money on the development of his property. No prior decision of this Court supports the view that the substantive limitation inherent in the concept of due process of law restricts the policy choices a local government can make with regard to applications to maximize the number of building lots on a parcel of land.

The cases petitioner cites in his Petition for Writ of Certiorari are not land use cases, and certainly are not cases establishing a constitutionally protected right to maximize the profitability of real property. *See* Petition for Writ of Certiorari, p. 8. Rather, this Court's prior decisions expressing constitutional concerns regarding the use of conclusive presumptions all deal with such fundamental rights as the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct 995 (1972), the right to custody of one's children, *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct 1208 (1972), or the right of

pregnant women to work, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 39 L.Ed. 2d 52, 94 S.Ct 791 (1974).

Petitioner cannot show that *all* conclusive presumptions violate the substantive limitation inherent in the due process clause. Young persons are conclusively presumed to be mature enough to vote, drive, and drink alcoholic beverages only after reaching certain threshold ages. The due process clause does not require hearings at which particularly mature individual young persons have the opportunity to present evidence showing that they are, in fact, capable of performing these responsibilities adequately at ages younger than the otherwise applicable threshold ages. Not all conclusive presumptions violate due process rights. Petitioner has not shown the infringement of a constitutionally protected right in this case.

Third, petitioner has provided no information suggesting that the presumption embodied in the administrative rule at issue in this case is anything but perfectly reasonable. Petitioner has the burden to prove the unconstitutionality of the administrative rule in this case. Petitioner has come forward with no evidence suggesting that the 40 percent slope threshold embodied in BALD's administrative rule does not appropriately delineate the point at which slopes become too steep to support multiple homesites. The record in this case is woefully inadequate to support petitioner's claim. There is no basis for a reviewing court to second guess the wisdom of the 40 percent threshold contained in the administrative rule at issue in this case.

B. Petitioner has not demonstrated the existence of an administrative remedy so burdensome as to violate procedural due process.

Petitioner complains that it would have been futile for him to commission the studies necessary to demonstrate that his proposed development could be safely accomplished. There are several reasons that this complaint is without merit.

First, if petitioner felt he should not have to prepare the studies required by King County, he should have availed himself of the administrative appeal provided specifically to challenge the requirement to do such studies. Having failed to avail himself of this administrative remedy, petitioner cannot now complain he should not have had to provide the required studies. Petitioner characterizes the application in this case of the requirement that one exhaust administrative remedies before bringing a judicial appeal as "a prime example of the insidious and reprehensible use of the remedies doctrine as a 'roadblock' to the challenge of unconstitutional regulations." Petition for Writ of Certiorari, p. 13. King County considers the exhaustion requirement to be neither "insidious" nor "reprehensible." Rather, the requirement that administrative remedies be exhausted is based upon sound considerations of judicial and administrative economy.

Second, petitioner asked the King County Hearing Examiner to approve his short plat application without the required studies. The Hearing Examiner, quite reasonably, denied this request. The Hearing Examiner's decision was not based on petitioner's failure to exhaust

administrative remedies, it was based on petitioner's failure to demonstrate his proposed development could be safely accomplished. The Hearing Examiner's decision was a reasonable response to an unreasonable request by petitioner. Petitioner cannot now be heard to complain that he should have asked for different relief. Petitioner asked the Hearing Examiner to approve his short plat application without the special studies. The Hearing Examiner's denial of this request did not violate petitioner's due process rights.

Third, petitioner has made no showing that providing the required information regarding the safety risks inherent in his proposal to develop a very steep hillside would have been futile. Petitioner has shown that BALD had a rule that it would not approve short plats on steep slopes and that two employees of BALD said the agency would deny petitioner's application with or without the required studies. The decision at issue in this case, however, is the decision of the Hearing Examiner. Petitioner has provided no evidence suggesting that the King County Hearing Examiner would not have considered the studies, had petitioner chosen to do them. Indeed, the Examiner specifically cited the lack of studies as a reason for denial of petitioner's application.

The final decision made on behalf of King County with regard to petitioner's short plat application was not made by BALD, it was made by the King County Hearing Examiner. The Hearing Examiner is independent of BALD, and in fact independent of the executive branch of government in King County. The Hearing Examiner is an arm of the King County Council, the legislative branch of King County government. The Hearing Examiner makes

decisions on behalf of the Council with regard to certain, specified land use applications.

Petitioner has made no showing that the administrative rule adopted by BALD would have been followed by the Hearing Examiner, particularly if petitioner had come forward with evidence showing that his development could be safely accomplished. Instead, petitioner provided no information demonstrating the safety of his development proposal, and yet still requested that his proposal be approved. The Hearing Examiner simply denied his unreasonable request.

Petitioner was afforded a hearing regarding his development proposal. The hearing was not a sham, it was a real hearing at which petitioner was able to present witnesses and cross-examine County employees. The fact that the Hearing Examiner held against petitioner does not establish that petitioner's constitutional right to procedural due process was violated.

III. CONCLUSION

Petitioner has not carried his burden to demonstrate a compelling reason for this Court to accept review of the instant case. For the reasons stated above, King County respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

DATED this 11th day of June, 1996.

Respectfully submitted,

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